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SJC-12756

COMMONWEALTH vs. TOMMY BIRKS.

March 6, 2020.

Practice, Criminal, Capital case, Postconviction relief.

The defendant, Tommy Birks, was convicted of murder in the first degree on a theory of joint venture. See Commonwealth v. Birks, 435 Mass. 782, 783 (2002). In February 2019, he filed in the county court a "Petition to Supreme Judicial Court Requesting Relief in the Form of an Order to the Trial Court to Correct the Record" and a "Motion Requesting Leave to Enter Petition on the Docket of the Supreme Judicial Court" (collectively, petitions), purportedly pursuant to the gatekeeper provision of G. L. c. 278, § 33E. On the basis that Birks had not first sought the requested postconviction relief in the Superior Court, and that there thus was no Superior Court decision from which Birks sought leave to appeal pursuant to G. L. c. 278, § 33E, a single justice dismissed the petitions.¹ Birks has appealed from the single justice's ruling.

Birks argues that the relief that he seeks -- what he terms "correcting the record" -- is not available in the Superior Court, at least not without an order from this court directing the lower court to correct the record. What he seeks appears to be something more than merely "correcting the record" -- he asks, for example, that the court order the preparation of transcripts for certain hearings that took place in the course of the trial court proceedings that led to his trial and conviction -- but in any event there is no reason why he cannot in fact seek relief on any of these points in the first instance

¹ The single justice also subsequently denied several motions that Birks thereafter filed in the county court.

in the Superior Court. Should relief be denied, he is free to then apply to a single justice of this court for leave to appeal from that denial, pursuant to G. L. c. 278, § 33E.

Judgment affirmed.

The case was submitted on briefs.

Tommy Birks, pro se.

Cynthia Cullen Payne, Assistant District Attorney, for the Commonwealth.